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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. 412

NATALIE M. KALMUS,
Petitioner and Appellant Below,

vs.

HERBERT T. KALMUS, and TECHNICOLOR MOTION PICTURE CORPORATION (a corporation),
Respondents and Appellees Below.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the Second Appellate District,
Division One Thereof
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

Page

Petition for writ of certiorari 1
Reasons relied on for the allowance of the writ..... 6

Brief in support of petition for writ of certiorari..... 9

I.

Opinion of the court below 9

II.

Jurisdiction 10

III.

Statement of the case 13

IV.

Specifications of errors 13

V.

Argument 14
Summary of argument 14
Point A 15
Point B 17

Table of Authorities Cited

Cases

	Pages
Aetna L. Ins. Co. v. Dunken, 256 U.S. 389	16
Bedgisoff v. Cushman, 12 Fed. Rep. (2d) 667	6, 12
Bowen v. Douglass, 2 U.S. (Dallas 2) 38	6, 12
Cook v. Cook, 56 Wis. 195	17
Craig v. Harney, 331 U.S. 91	16
Davidson v. City of New Orleans, 96 U.S. 97	16
Earnshaw v. United States, 146 U.S. 60	6, 12
Foley v. Foley, 120 Cal. 33	16
Gray v. Hall, 203 Cal. 306	16
Herb v. Pitcairn, 324 U.S. 117	16
Hovey v. Elliott, 167 U.S. 409	16
Hunt v. Hunt, 72 N.Y. 217	17
Hunter v. Fairfax's Devisee, 3 U.S. (Dallas 3) 241	6, 12
Hurst v. Hurst, 3 U.S. (Dallas 3) 404	6, 12
Hyser v. Hyser, 53 Colo. 199	7
McClatchey v. Superior Court, 119 Cal. 413	16
Northern Pacific Ry. Co. v. North Dakota, 236 U.S. 585	16
Pacific Gas etc. Co. v. Taylor, 52 Cal. App. 307	16
Royster v. Lederle, 128 Fed. Rep. (2d) 197	6, 12
Smith v. Smith, 145 Cal. 615	16
Truax v. Corrigan, 257 U.S. 66	16
U. S. v. Moore, 129 Fed. 630	16
U. S. v. Yount, 267 Fed. 861	16

Codes

28 U.S.C.A., Section 1257, subdivision 3, pages 79-80 ..... 10, 15

Texts

12 Am. Jur. page 450	16
5 Cal. Jur. page 875, Section 224	16
6 R.C.L. pages 544-546 and 551	16

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To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and the Honorable Associate Justices thereof:

Your petitioner respectfully shows:

I.

This is a suit in equity, brought in the Superior Court of the State of California, in and for the County of Los Angeles by petitioner herein against the respondent herein for support, and maintenance on the grounds of extreme cruelty, desertion, and adultery; for a dissolution of partnership; for an accounting and for appointment of receiver. (R. pages 1 to 13.)

Petitioner in addition to the foregoing asked that the common law marriage of petitioner and respondent Herbert T. Kalmus, be declared valid; that petitioner be adjudged a partner in Technicolor Motion Picture Corporation and that respondent Herbert T. Kalmus account to petitioner for all assets, profits and property of the partnership; that petitioner be awarded all of the community property, attorney's fees, in the sum of $200,000, temporary alimony of $3000 a month and court costs of $40,000 and for a restraining order preventing respondent from selling, transferring or disposing of any of the property in respondent's possession. (R. pages 12 and 13.)

Respondent filed an answer and cross-complaint denying any marriage, partnership, or indebtedness to petitioner; respondent pleaded a certain contract

dated February 19, 1945, which he alleged settled all of their community and partnership rights (R. page 54); respondent also pleaded the validity of a divorce decree nisi entered December 22, 1921, in Massachussetts in an action entitled Natalie M. Kalmus vs. Herbert T. Kalmus, No. 46894 in the Superior Court of Norfolk County, Commonwealth of Massachussetts (R. pages 13 and 14); respondent further requested a permanent injunction restraining petitioner from making any claims as hereinabove set forth and from intimidating, humiliating, molesting, threatening, harassing, annoying, vexing, or embarrassing respondent. (R. pages 20-21 and 22.)

Respondent further alleged that an actual bona fide dispute exists between petitioner and respondent concerning which respondent requested a declaration of his rights with respect to petitioner. (R. page 14.)

Prior to the trial petitioner's application for temporary support, attorney's fees, and court costs (R. page 12) had been denied. (R. pages 97-98.)

The case was set for trial for June 1, 1949. (R. page 58.)

On May 24, 1949, petitioner through her counsel filed a Notice of Motion for a Continuance of the trial of said action based on the serious illness of petitioner, in Boston, Massachusetts, where petitioner was under medical care (R. page 58) for hypertension —with question of Meniere's Disease, hepatitis (R. page 60), and that petitioner would be unable to make

the transcontinental trip to Los Angeles, without jeopardizing her health. That accompanying said Notice for a Continuance was the affidavit of Lowrey F. Davenport, M.D. of Boston, Massachussetts. (R. page 60.)

That the Notice of Motion for a Continuance further averred that another action was pending in the Superior Court of Norfolk County, Commonwealth of Massachusetts entitled, "Natalie M. Kalmus v. Herbert T. Kalmus" being case Docket No. Equity 46894 which involved the setting aside a divorce decree between the same parties, on the ground of fraud and that said action would materially effect the issues involved in the case at before the Los Angeles Superior Court. (R. pages 58 and 59.)

That an affidavit in support of the pending Massachussetts action and the issues involved was made by David H. Aronson, attorney for petitioner.

That said Notice of Motion for a Continuance was set for hearing on May 31, 1949, the day before the trial.

That petitioner's request for a continuance of the trial was denied May 31, 1949. (R. page 63.)

That on June 1, 1949 the day of the trial petitioner's attorneys Clifford Thoms and David L. Sefman, withdrew as her attorneys (R. page 64) and the Court that same day made its order granting the motion of said attorneys to withdraw as counsel for petitioner. (R. page 65.)

That the action of Natalie M. Kalmus v. Herbert T. Kalmus, Technicolor Motion Picture Corporation, No. D-370,515 proceeded to trial on June 1, 1949 in the absence of petitioner or her counsel, she being without attorney at the time. (R. pages 66 to 94, inclusive.)

That said action was tried as a default proceeding. (R. page 66.)

Judgment was rendered for respondent. (R. pages 51 to 56, inclusive.)

That ten witnesses, including respondent's attorney, testified at said trial and considerable documentary evidence was introduced by respondent against petitioner. (R. pages 66 to 94.) That the trial Court further declared in its judgment that it had jurisdiction of the equity action No. 46894 then pending in the Massachussetts Superior Court between petitioner and respondent and did adjudge the entry of the decree of divorce in that action to be a final and absolute adjudication of divorce, in full force and effect and unimpaired by any act or conduct of petitioner and respondent. (R. pages 52 and 53.)

Appeal was taken by petitioner from said judgment to the District Court of Appeal of the State of California in and for the Second Appellate District, Division One thereof.

That Court by its decision affirmed the judgment of the trial Court. (R. pages 95 to 113.)

Petitioner's request for a hearing by the Supreme Court of California was denied June 11, 1951, Carter, justice, voting for the hearing.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

That said District Court of Appeal of the State of California, Second Appellate District, Division One thereof in said case decided the federal question of substance as to a denial of due process of law to petitioner, by rendering a judgment in favor of respondents and against petitioner, at a time when petitioner was under medical care in Boston, Massachussetts and without counsel to represent her, which decision is not in accord with the general decisions of this Court, including the cases of:

Hunter v. Fairfax's Devisee, Vol. 3 U.S. (Dallas 3) 241;

Bowen v. Douglass, Vol. 2 U.S. (Dallas 2) 38;

Hurst v. Hurst, Vol. 3 U.S. (Dallas 3) 404;

Bedgisoff v. Cushman, 12 Fed. Rep. (2d) 667;

Earnshaw v. United States, 146 U.S. 60 at page 68;

Royster v. Lederle, 128 Fed. Rep. (2d) 197.

but that the specific question of a Court proceeding to trial in a domestic action of separation in the absence of the plaintiff, who was ill and under a doctor's care in another state and without counsel has not been passed upon by this Court.

That the highest Court of Colorado has reached a different conclusion from the California Appellate Court in

Hyser v. Hyser, 53 Colorado 199 at pages 202 and 203.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the District Court of Appeal of the State of California, Second Appellate District, Division One thereof, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said District Court of Appeal of the State of California, Second Appellate District, Division One thereof had in the case numbered and entitled Civ. Nos. 17534, 17672 and 17700, Natalie M. Kalmus, appellant and Herbert T. Kalmus and Technicolor Motion Picture Corporation, a corporation, respondents, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said District Court of Appeal of the State of California, Second Appellate District, Division One thereof be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, Oakland, California,
November 2, 1951.

NATALIE M. KALMUS,
Petitioner,
By R. A. ROGERS,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

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NATALIE M. KALMUS,
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vs.

HERBERT T. KALMUS, and TECHNICOLOR MOTION PICTURE CORPORATION (a corporation),
Respondents and Appellees Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the District Court of Appeal of the State of California, Second Appellate District, Division One, thereof, is reported in 103 A.C.A. No. 4 at pages 496 to 516 inclusive.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is June 11, 1951. (R. page 114.)

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1257, Subdivision 3, U.S.C.A. Title 28, pages 79-80.

3. That petitioner on June 1, 1949, the day of the trial, was under the care of a physician in Boston, Massachusetts. That said physician filed an affidavit with the trial Court prior to June 1, 1949 stating that petitioner was suffering from hypertension, mild question of Meniere's Disease and hepatitis and that he did not consider petitioner's physical condition would permit the physical ordeal of a transcontinental trip and a prolonged legal trial and that such a trip and trial would jeopardize her present condition of health. (R. page 66.)

That petitioner's illness was an unavoidable accidental condition which prevented petitioner from being present at her trial.

That on June 1, 1949, the day of the trial, petitioner was without counsel to represent her, her counsel having been permitted to withdraw as her attorneys on that day. (R. pages 64 and 65.)

That prior to said trial petitioner had appeared *in propria personam* in her litigation from February 10, 1949 up to and including May 20, 1949 (R. page 57) when she engaged David L. Sefman and Clifford

Thoms (R. page 63) to attempt to secure a continuance of the trial of petitioner's action set for June 1, 1949 (R. page 112), and upon their failure so to do, they resigned as petitioner's counsel (R. pages 64-65), leaving petitioner without counsel on the day of her trial (R. pages 66 to 94) and at a time when she was ill in Boston, Massachusetts. (R. page 60.)

That the trial Court in proceeding with the trial (R. page 67) under the above circumstances, when the matters involved were support and maintenance, dissolution of partnership, accounting, injunctive relief and the respondent was asking declaratory relief from personal and financial obligations to petitioner (R. pages 20-21) was arbitrary and unjust. That petitioner's action was one for separate maintenance. (R. page 1.)

In cases of this kind, where continuances are requested as compared to ordinary actions at law, it is the policy of the law to grant such continuances in order to afford a full hearing to both parties.

That public policy requires such a hearing and when a party to such a proceeding is denied a continuance in order to have his day in Court, such denial under the above circumstances constitutes a denial of due process of law.

There is nothing in the record to show that respondent would have been injured or prejudiced by a reasonable continuance.

The trial Court's action in refusing petitioner a continuance and then proceeding to a default judg-

ment against her, was a denial to petitioner of her day in Court and the injunctive relief which the Court granted respondent as well as the Court's decision of divorce proceedings between the same parties pending in the State of Massachusetts (R. pages 52, 53, 54, 55, 56) was arbitrary, unjust and in excess of its jurisdiction and the District Court of Appeal in affirming such judgment permitted the trial Court to deprive petitioner of her marital status and substantial monetary claims without due process of law, in this that she had no opportunity to offer any evidence, both oral and documentary, in support of her claims or to deny testimony of the respondent as well as to cross-examine the respondent and his witnesses. (R. page 67.)

4. The cases believed to sustain said jurisdiction are as follows:

Hunter v. Fairfax's Devisees, 3 U.S. (Dallas 3) 241;

Bowen v. Douglass, 2 U.S. (Dallas 2) 38;

Hurst v. Hurst, 3 U.S. (Dallas 3) 404;

Bedgisoff v. Cushman, 12 Fed. Rep. (2d) 667;

Earnshaw v. United States, 146 U.S. 60 at page 68;

Royster v. Lederle, 128 Fed. Rep. (2d) 197.

III.

STATEMENT OF THE CASE.

This has already been stated in the petition under paragraph I, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERRORS.

The District Court of Appeal of the State of California, Second Appellate District, Division One, erred in affirming the judgment of the trial Court (R. pages 95 to 113) upon the following grounds:

(1) That said Court in affirming the denial of a continuance of the trial of petitioner's case by reason of her illness, and proceeding with said trial as a default proceeding (R. page 66) and disposing of the marital claims of petitioner as well as valuable property rights in her absence was a denial of due process of law to petitioner.

(2) That the Court erred in refusing a continuance of the trial of petitioner's case by reason of the pendency of an action to set aside a decree of divorce in Massachusetts on the ground of fraud and then proceeding to determine the validity of the facts involved in the Massachusetts action. (R. pages 52, 53, 56.)

(3) That the Court erred in permanently enjoining and restraining petitioner (R. page 55) from

"engaging in any course of conduct designed to intimidate, humiliate, harass, vex or embarrass defendant and cross-complainant" (respondent) here, (R. page 56), which said injunction makes petitioner subject to contempt proceedings for the assertion of any rights in any Court proceeding.

This injunction precludes petitioner from ever having her day in Court without, at the whim and caprice of the respondent, of being in contempt of the Superior Court of the State of California in and for the County of Los Angeles. (R. pages 55 and 56.)

(4) That the Court erred in determining the validity of the rights of petitioner in action No. 46,894 pending in the Superior Court of Massachusetts. (R. page 56.)

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A. Petitioner in being denied a reasonable continuance of the trial of her case, by reason of her illness, was denied due process of law, because the injunctive relief granted respondent restrains petitioner from ever attacking said default judgment without at the whim or caprice of respondent of being in contempt of the trial court.

Point B. The court erred in determining whether the Massachusetts decree of divorce was duly and regularly given in action No. 257 or whether fraud

was involved in its procurement as contended by petitioner in Massachusetts action No. 46,894. (R. pages 43 and 56.)

POINT A.

The action of petitioner being in equity for separate maintenance, dissolution of partnership, accounting, and appointment of receiver involved substantial rights entitling petitioner to a trial on the merits. The Court's denial of a reasonable continuance of the trial at petitioner's request because of her illness and then proceeding with the trial of the case in her absence and at a time when she was without counsel, was a denial of due process of law to petitioner.

In respondent's findings of fact (R. page 35), respondent admits that an "actual bona fide dispute exists between defendant and plaintiff.

It is respectfully contended that this Court has jurisdiction by reason of Section 1257, Subd. 3, U.S.C.A. Title 28, page 88, to review the decision of the District Court of Appeal of the State of California, Second Appellate District, Division One, thereof, which is as follows:

> "Final judgment or decrees rendered by the highest court of a state in which decisions could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari when the validity of a * * *, or when any title, right, privilege or immunity is specially set up, or claimed

under the Constitution, treaties, or statutes of, or commissions held or authority exercised under the United States."

The cases having an important bearing on petitioner's denial of due process of law are:

Herb v. Pitcairn, 324 U.S. 117;
Craig v. Harney, 331 U.S. 91;
Northern Pacific Ry. Co. v. North Dakota, 236 U.S. 585;
Hovey v. Elliott, 167 U.S. 409;
Aetna L. Ins. Co. v. Dunken, 256 U.S. 389;
Truax v. Corrigan, 257 U.S. 66;
U. S. v. Yount, 267 Fed. 861;
Davidson v. City of New Orleans, 96 U.S. 97;
U. S. v. Moore, 129 Fed. 630;
Smith v. Smith, 145 Cal. 615, at pages 618, 619 and 620.
Pacific Gas etc. Co. v. Taylor, 52 Cal. App. 307 at pages 308, 309, 310 and 311;
McClatchey v. Superior Court, 119 Cal. 413 at pages 416, 418, 419 and 420;
Foley v. Foley, 120 Cal. 33 at page 42;
Gray v. Hall, 203 Cal. 306, at pages 323, 324;
6 *R.C.L.* pages 544-546 and 551;
12 *Am. Jur.* page 450;
5 *Cal. Jur.* page 875, Sec. 224.

POINT B.

The Court had no jurisdiction to determine the validity of the divorce action No. 2575 in Massachusetts or the equity action No. 46,894 in the same state, to vacate and set aside the divorce decree on the grounds of fraud, for the reason that each state is the sole judge of the marital status of its citizens:

Cook v. Cook, 56 Wisconsin 195;
Hunt v. Hunt, 72 N.Y. 217.

This is also true because the state is an interested party to all actions for divorce and separation.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated, Oakland, Califonia,
November 2, 1951.

R. A. ROGERS,
Counsel for Petitioner.